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No. 86-130

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

VICKIE LORENE ROCK,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARKANSAS

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EDITOR'S NOTE

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QUESTION PRESENTED

Is Arkansas' evidentiary rule admitting the pre-hypnotic perceptions and memories of a witness, including a criminal defendant, but excluding the post-hypnotic perceptions and memories of a witness, including a criminal defendant, constitutionally permissible?

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Amicus files this brief pursuant to Rule 36.4 of the Supreme Court of the United States.

INTEREST OF AMICUS

This brief is respectfully submitted in support of respondent, who

urges affirmance of petitioner's conviction in Rock v. State of Arkansas 708 S.W.2d 78 (Ark. 1986). There, the Arkansas Supreme Court held that events recalled by the defendant as the result of being hypnotized for the purpose of refreshing her recollection were inadmissible at trial because hypnosis is not a reliable technique for producing truth.

The use of hypnosis has long been an effective therapeutic tool, used by psychiatrists, psychologists, and other health care professionals to help patients to deal with traumatic situations, to remember repressed events, or merely to relax.

Much more recently, hypnosis has begun to be used as an investigative tool by both the prosecution and the defense in criminal

cases. It is similar to the standard interview of percipient witnesses in any criminal case, but its virtue is that it allows witnesses to relax and to concentrate, more effectively than in the standard interview, on the events of the crime they have observed. Effective investigative hypnosis enhances the recall of percipient witnesses to crime and thus is an invaluable investigative technique for both the prosecution and the defense. To the extent that it aids in the conviction of the guilty and the exoneration of the innocent, amicus submits that it is a technique which should be approved by this Court.

Investigative hypnosis is a relatively new field, however, and is thus inevitably the subject of much controversy. While experts in the

field of investigative hypnosis proclaim its virtues and deny any vices, some experts (and so-called experts) in the health care fields are critical of the use of hypnosis, urging everything from caution in its use to an outright ban on the technique.1/ The concerns expressed about the use of hypnosis in the investigation of criminal cases are the same concerns expressed about the admissibility of any evidence (e.g., line-up identification): that is, is the

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1. California has adopted the latter position: the use of investigative hypnosis by California law enforcement officers results in the hypnotized witness' testimonial incapacity at trial. (See People v. Shirley 31 Cal.3d 18 (1982), cert. den. 459 U.S. 860 (1982); People v. Guerra 37 Cal.3d 385 (1984); but see also California Evid. Code, § 795.) Criminal defendants in California, however, are exempt from this otherwise absolute exclusionary rule. (People v. Shirley, supra, 31 Cal.3d at 67.)

evidence reliable or is the procedure used so suggestive as to render the evidence unreliable? To the extent that hypnosis, employed by either the prosecution or the defense, produces unreliable evidence, it is a technique which should be disapproved by this Court.

Since investigative hypnosis is a remarkably effective technique when used by the prosecution or the defense in the investigation of criminal cases, it is amicus' interest that the technique be approved by this Court. To the extent that investigative hypnosis produces unreliable evidence, however, that evidence should be inadmissible in any criminal proceeding. Acknowledging the unresolved dispute among hypnotists about the reliability of the technique,

amicus submits that the position adopted by the Arkansas Supreme Court in this case is a reasonable, constitutionally permissible position. First, events perceived and recalled by any witness prior to being hypnotized for investigative purposes are admissible in Arkansas, for they are free of any undue suggestion which may be inherent in the hypnosis process. Second, events perceived and/or recalled as a result of the hypnosis session are inadmissible, because Arkansas has found that as yet there is little agreement among hypnosis experts as to their reliability.[2/] Third, the rules governing the admissibility of

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2. The product of any hypnosis session could of course stimulate further investigation by the party using the technique, as, indeed, it did in the investigation of petitioner's case below.

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the testimony of previously hypnotized witnesses must apply equally to the prosecution and the defense, for our system of justice decries the introduction of unreliable evidence by either party.

For these reasons, amicus contends that it is constitutionally permissible for the State of Arkansas to allow defendant Rock to testify at her criminal trial as to matters which she perceived and recalled prior to being hypnotized but to prohibit defendant Rock from testifying as to matters which she perceived and/or recalled as a result of the hypnosis session.

SUMMARY OF ARGUMENT

Hypnotizing percipient witnesses to crime is an effective information-gathering technique in the

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investigation of a criminal case for both the prosecution and the defense.

Critics of investigative hypnosis cite dangers in the use of the technique, arguing that the product of hypnosis may be unreliable. Investigative hypnotists contend that the technique is effective and produces reliable and otherwise unavailable information.

In response to this dispute, courts have taken one of four positions as to the admissibility of the testimony of previously hypnotized witnesses:

1. The fact of hypnosis goes to weight, not the admissibility, of hypnotically produced evidence.

2. A previously hypnotized witness may testify to both pre- and post-hypnotic perceptions and memories

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if specified safeguards in the hypnosis procedure are employed.

3. A previously hypnotized witness may testify to pre-hypnotic perceptions and memories but not to post-hypnotic perceptions and memories, for there is still some dispute about the reliability of the latter. (This is the position of Arkansas in the instant case.)

4. A previously hypnotized witness, for either the prosecution or the defense, is rendered unavailable to testify as to any matters related to those covered in the hypnosis session. Criminal defendants are exempt from this exclusionary rule.

Amicus contends that the first three positions are constitutionally permissible evidentiary decisions by state and

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federal courts, while the fourth position is constitutionally impermissible because it violates the right to due process of law.

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ARGUMENT

I

THE USE OF HYPNOSIS IS AN EFFECTIVE TECHNIQUE IN THE INVESTIGATION OF CRIMINAL CASES, BUT, BECAUSE OF THE DISPUTE AMONG HYPNOTISTS ABOUT THE RELIABILITY OF THE TECHNIQUE, ARKANSAS' DECISION TO EXCLUDE POST-HYPNOTIC PERCEPTIONS AND MEMORIES IS CONSTITUTIONALLY PERMISSIBLE.

In 1958, the Council on Mental Health of the American Medical Association, after an extensive two-year study, endorsed hypnosis as a therapeutic technique.[3/] Shortly thereafter, interest in hypnosis as a tool in the investigation of crime began to grow, and, by 1972, the Los Angeles, California, Police Department (LAPD) was using hypnosis on

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3. Spector and Foster, Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible? 38 Ohio State L.Rev. 567 (1977).

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an occasional basis as an aid in gathering evidence in homicide cases.[4] When this use of hypnosis proved successful, the LAPD devised a one-year project to test the feasibility of training experienced police investigators to use hypnosis techniques with volunteer witnesses and victims to enhance their recall about the events of a crime.[5] This project was carried out in 1975-1976, and, in the 70 investigations in which hypnosis was used, it was estimated that in about 77% of them information was elicited by hypnosis of importance to the case investigator that had not previously been elicited during routine

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4. Martin Reiser, Handbook of Investigative Hypnosis, LEHI Publishing Co., L.A., p. xiv (1980).

5. Id., at p. xv.

interviews.[6] As a result of this success, Dr. Martin Reiser of the LAPD established the Law Enforcement Hypnosis Institute in 1976, an institute which provided training in hypnosis to criminal justice agencies interested in adding the technique of hypnosis to their other investigative tools.[7] Estimates are that hypnosis was used[8] as an investigatory tool by the LAPD, for example, in over 50% of

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6. Id.

7. Id., at p. xvi.

8. Amicus uses the past tense advisedly. In 1982, the California Supreme Court, in the case of People v. Shirley, supra, 31 Cal.3d 18, ruled that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward." (Id. at 66-67.) This exclusionary rule virtually eliminated the use of investigative hypnosis in California.

its cases.[9] Thus, hypnosis can be a remarkably effective tool in the investigation of a criminal case by law enforcement.

Hypnosis is, of course, an equally effective investigative technique when used by the defense, whether the subject is the defendant or a defense witness. Moreover, in California at least, the right of a defendant in a criminal case to be hypnotized is an adjunct of the accused's right to counsel and is often an essential tool in the preparation of the accused's defense.[10]

Although experts do not agree on an exact definition of hypnosis or

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9. Fountain, Hypnosis: Understanding Its Use in the Criminal Process 11 Texas Tech. L.Rev. 113, 122-1232 (1979).

10. See Cornell v. Superior Court of San Diego County 52 Cal.2d 99 (1959).

on a theory as to how it works,[11] there is considerable agreement about its uses, its limitations, and the potential for its abuse. First, unlike the polygraph test or the use of sodium pentathal, hypnosis is not a tool for ascertaining truth or falsity. Rather, it is merely an effective technique for reviving or refreshing memory, regardless of the truth or falsity of that memory and the perceptions from which that memory derives.[12] Hypnosis does not guarantee that the memory will be refreshed, nor does it insure that the memory, once refreshed, will be any more reliable or accurate than memory recalled without the aid of hypnosis. Hypnosis cannot even guarantee that the

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11. See Spector and Foster, supra, at page 569.

12. See Spector and Foster, supra, at pages 584-591.

hypnotized subject will not lie under hypnosis.13/ In sum, hypnosis is but another technique for gathering evidence which then can be presented to the triers of fact for their evaluation.

Second, although hypnosis is not a tool for ascertaining truth or falsity, it is an extremely effective aid in reviving or refreshing memory. For example, as an investigative tool, hypnosis was used on the bus driver in the famous Chowchilla kidnapping case.14/ Under hypnosis, the bus

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13. See People v. Lopez 110 Cal.App.3d 1010 (1980).

14. In 1976, three young men stopped and took control of a Chowchilla, California, school bus full of children and buried the bus and its occupants in a pre-prepared underground hiding place. The young men planned to keep the location of the buried school bus secret until they had collected a ransom from the town of Chowchilla. Fortunately, the occupants of the

driver was able to recall a key license plate number which he had previously been unable to recall and which led to the arrest of the kidnappers in that case.[15] As a defense tool, hypnosis is important in assisting the accused prepare his defense, particularly where the accused, because of intoxication, trauma, or other relevant mental states, "is unable to remember his whereabouts and activities during the critical time involved. . . ."[16] The virtue of hypnosis is that it allows the hypnotized subject to relax to the

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school bus were able to climb to safety out of the bus' "grave."

15. See Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 Cal. L.Rev. 313, 315-316, footnote 7(f) (1980).

16. Cornell v. Superior Court of San Diego County, supra, 52 Cal.2d at page 101.

extent that the subject can concentrate on a past event in a focused way that is generally not possible without hypnosis.[17/] Thus, the effectiveness of hypnosis as an information-gathering tool is unquestioned.

However, despite general agreement about the nature and effectiveness of hypnosis as an information-gathering technique, some critics of investigative hypnosis contend that there are three major dangers of hypnosis as an investigative tool. First, according to these critics, there is the problem of suggestibility, the risk that what the hypnotist says or does will suggest responses to the subject under

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17. See People v. Boudin 460 N.Y.S.2d 879, 881 (Sup. 1983).

hypnosis.[18] Since hypnosis is by its very nature a suggestible state of consciousness and since there is often a bond between hypnosis and subject wherein the subject desires to please the hypnotist, there is some danger that if the hypnotist asks leading or suggestible questions, the subject will adopt the hypnotist's suggestion rather than answering from his own memory.[19] Second, there is the possibility, according to critics, that a subject under hypnosis will deliberately lie or confabulate (compensate for loss of memory by fabricating details which provide a response to the hypnotist's

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18. See Spector and Foster, supra, 38 Ohio State L.Rev. 567; Fountain, supra, 11 Texas Tech. L.Rev. 113.

19. See State v. Hurd, 173 N.J.Super. 333, 414, A.2d 291, affirmed 86 N.J. 525, 432 A.2d 86 (1981).

question or request).[20] Third, critics contend that a previously hypnotized witness will be impervious to cross-examination, his or her perceptions or memories having become "concreted" by the hypnotic process.[21]

Experts in the field of investigative hypnosis dispute these dangers in the use of investigative hypnosis.[22] They contend that the hypnotic state is no more a suggestible state than any other.[23] Moreover, while investigative hypnotists agree that a subject can lie under hypnosis,

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20. See Spector and Foster, supra.

21. See People v. Boudin, supra, 460 N.Y.S.2d 879, 881 (Sup. 1983).

22. See Reiser, Police Use of Investigative Hypnosis: Scientism, Ethics, and Power Games, American Journal of Forensic Psychology, Volume II, No. 3, 115 (1984).

23. Id. at 116-117.

just as he/she can in any interview situation, they contend that hypnosis does not distort memory or create false memory.[24] Finally, investigative hypnotists deny that a hypnotized subject's perceptions or memories are "concreted" by the hypnotic process.[25]

Ultimately, when a witness in a criminal case has been hypnotized prior to trial, there are several legal principles at stake. First, of course, is the need by both sides to discover as much evidence as possible about the crime and who committed it. Second is the entitlement of both parties to a fair trial,[26] including the testimony of percipient witnesses who are

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24. Id. at 119-122.)

25. Id. at 128.

26. See U.S. v. Nixon 418 U.S. 683, 708-709 (1974).

testifying from their own personal knowledge about the events of the crime, and the right to effective cross-examination of all witnesses by both parties. In response to these legal principles, which can sometimes be in conflict in hypnosis cases, the following positions have been taken by courts across the country with respect to the admissibility of the testimony of a witness who has been hypnotized prior to trial.

1. The majority view in the state and federal courts is that hypnotically induced testimony is admissible, that the fact that hypnosis produced the evidence goes to the weight not the admissibility of the evidence.[27/]

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27. United States v. Adams, 581 F.2d 193 (9th Cir. 1978); cert. denied, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d

2. A related but slightly stricter view is that a previously hypnotized witness may testify to events perceived prior to hypnosis and to events the memory of which was refreshed or revived by hypnosis, if adequate procedural safeguards are utilized to insure that the witness is

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683; United States v. Awkard, 597 F.2d 667 (9th Cir. 1979), cert. denied, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116; United States v. Miller, 411 F.2d 825 (2nd Cir. 1969); United States v. Narciso, 446 F.Supp. 252 (E.D.Mich. 1977); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Chapman v. State, 638 P.2d 1280 (Wyo. 1982); Clark v. State, 379 So.2d 372 (Fla.App. 1979); People v. Smrekar, 68 Ill.App.3d 379, 24 Ill.Dec. 707, 385 N.E.2d 848 (Ill. 1979); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (Georgia 1974); State v. Jorgensen, 8 Or.App. 1, 492 P.2d 312 (Oregon 1971); Pearson v. State, 441 N.E.2d 468 (Ind. 1982); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. 1981); State of Louisiana v. Wren, 425 So.2d 756 (Louisiana 1983); Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (Georgia 1979).

testifying from personal knowledge and present memory, that there was no improper suggestibility at the hypnosis session, and that there is adequate corroboration of the information induced by hypnosis to insure the reliability of that information.28/

3. A more recent approach is that adopted by Arkansas in the Rock case: once a witness has been hypnotized, he or she may not testify as to events recalled as a result of hypnosis, but may testify as to events recalled prior to hypnosis. This position allows the testimony of

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28. Sprynezynatyk v. General Motors Corp. 771 Fd 1112 (1985); State v. Hurd, supra, 173 N.J.Super. 333, 414 A.2d 291, affirmed 86 N.J. 525, 432 A.2d 86 (1981); People v. Lewis, 103 Misc.2d 881, 427 N.Y.S.2d 177 (1980); People v. Lucas, 107 Misc.2d 231, 435 N.Y.S.2d 461 (1980) and People v. McDowell, 103 Misc.2d 831, 427 N.Y.S.2d 181 (1980).

percipient witnesses but does preclude their testimony as to matters perceived or recalled as a result of hypnosis.29/

4. Standing alone is the case of People v. Shirley, supra, 31 Cal.3d 18, which holds, as noted above,

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29. State v. Peoples 319 S.E.2d 177 (N.C. 1984); State ex rel. Collins v. Superior Court of County of Maricopa, 644 P.2d 1266 (Arizona 1982); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (Pa.1981); Polk v. State, 48 Md.App. 382, 427 A.2d 1041 (Md. 1981); People v. Tait, 99 Mich.App. 19, 297 N.W.2d 853 (Md.App. 1980); People v. Blair 25 Cal.3d 640, 159 Cal.Rptr. 818, 602 P.2d 738 (1979); People v. Hanosleben, 86 Mich.App. 718, 273 N.W.2d 539 (Mich.App. 1978); Greenfield v. Robinson, 413 F.Supp. 1113 (W.D.Va. 1976); Rodriquez v. State, 327 So.2d 903 (Fla.App. 1976); Jones v. State, 542 P.2d 1316 (Okl.Cr. 1975); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231 (Ga. 1974); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (S.C. 1974); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (Va. 1974); People v. Harper, 111 Ill.App.2d 204, 250 N.E.2d 5 (Ill.App. 1969); State v. Harris, 241 Or. 224, 405 P.2d 492 (Oregon 1965); People v. Hughes 88 A.D.2d 17, 452 N.Y.S.2d 929 (N.Y. 1982).

that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward."30/ Criminal defendants are exempt from this exclusionary rule.31/

Amicus contends that the views expressed in People v. Shirley, set forth above, are unsound for the following reasons. First, the Shirley case relied almost exclusively on the California Law Review article of Bernard Diamond entitled "Inherent Problems In The Use Of Pretrial Hypnosis On A Prospective Witness."32/

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30. Id. at 66-67.

31. Id. at 67.

32. Diamond, 68 Cal.L.Rev. 313, 1980, supra.

Although Diamond was the "expert" to whom the California court deferred in its aberrant ruling, Diamond is, by his own admission, not an expert in the field of therapeutic or investigative hypnosis.33/

Second, applying the test of Frye v. United States, 293 F. 1013 (D.C.Cir. 1923) and People v. Kelley 17 Cal.3d 24 (1976), the Shirley opinion purported to preclude the admissibility of post-hypnotic memories because the technique of hypnosis has not gained general acceptance in the scientific community as a reliable procedure.34/ Acknowledging that the experts in the field do not agree on the reliability of hypnosis and thus that the product

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33. See People v. Boudin, supra, 460 N.Y.S.2d 879, 881 (Sup. 1983).

34. Id. at 51, et seq.

of this disputed technique should be inadmissible, the Shirley court then inexplicably and illogically chose the theories of one admitted non-expert (Diamond), adopted them as reliable, and held, based on those theories, that percipient witnesses are essentially rendered incompetent to testify at all if they have undergone investigative hypnosis. Thus, the Shirley court rendered not only the product of hypnosis inadmissible but also the previously hypnotized witness himself. Amicus contends that there is no scientific or legal basis for this total exclusion of the testimony of previously hypnotized witness and therefore that the Shirley opinion should be rejected as unsound.

Finally, for the reasons discussed more fully in Argument II,

infra, the Shirley holding must be rejected for it exempts criminal defendants from its per se exclusionary rule. The Shirley case excoriates[35] the unreliability of investigative hypnosis and then allows criminal defendants to use the technique and to offer its product, no matter how unreliable, as evidence in court.

In sum, amicus urges this Court to reject the Shirley rule not only because it is unsound but because it is constitutionally impermissible, for it precludes absolutely the prosecution or defense testimony of previously hypnotized percipient witnesses to crime, whether or not their testimony has been shown to be

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35. The Shirley opinion has been referred to as a "polemic." (See People v. Williams, 132 Cal.App.3d 920, 926 conc. opn. of Gardner, J. (1982).)

unreliable, thus depriving both the prosecution and the defense of due process of law in violation of the Fourteenth Amendment to the United States Constitution; and it permits the testimony of previously hypnotized criminal defendants, even if their testimony has been shown to be unreliable, thus depriving the People of due process of law.36/

The Shirley court did do one thing well and that was to identify the degree and intensity of the dispute among hypnotists as to the reliability of the perceptions and memories produced under hypnosis. Given that dispute, amicus submits that the position of the Arkansas Supreme Court is a reasonable and constitutionally

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36. See U.S. v. Nixon, 418 U.S. 683, 708 (1974).

permissible one: pre-hypnotic perceptions and memories of witnesses - whether prosecution witnesses, defense witnesses, or the defendant herself - are admissible; but perceptions and memories which are produced by hypnosis are not admissible, at least not at the present time, because experts in the field of hypnosis dispute their reliability. Accordingly, amicus urges affirmance of petitioner's conviction in Rock v. State of Arkansas 708 S.W.2d 78 (Ark. 1986).

II

THE TRIAL COURT'S RESTRICTION OF PETITIONER'S TESTIMONY TO EVENTS RECALLED PRIOR TO HER HYPNOTIC SESSION DID NOT VIOLATE HER RIGHT TO DUE PROCESS

Although she was allowed to testify at trial, petitioner contends that the trial court's ruling restricting her testimony to events recalled prior to her pretrial hypnotic session violated her right to due process under the Fourteenth Amendment by unduly restricting her right to prepare her defense and her right to testify on her own behalf. Petitioner's contention is meritless because, to the extent that trial courts may rely on evidentiary rules to restrict hypnotically-induced testimony by witnesses generally, they are not constitutionally required to make an

exception for defendants testifying on their own behalf.

As the Arkansas Supreme Court noted in the case at hand, rulings prohibiting criminal defendants from giving hypnotically-induced testimony[37/] and from testifying in an hypnotic trance[38/] have been upheld notwithstanding defense claims that these rulings violated due process. The Arkansas Supreme Court also correctly noted that, "Even defendants are subject to the rules of procedure and evidence, such as hearsay, or other instances of evidentiary exclusion, e.g., evidence that is prejudicial,

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37. State v. Atwood 479 A.2d 258, 264-265 (Conn. Super. 1984).

38. Greenfield v. Robinson, supra, 413 F.Supp. 1113, 1120 (W.D. Virginia 1976).

confusing, misleading, cumulative or time consuming."[39/]

That latter observation is borne out, for example, by a long line of California cases applying standard rules of evidence to criminal defendants: See People v. McNichol 100 Cal.App.2d 554, 556-559 (1950), report of statements made by the defendant while under the influence of sodium pentathol was properly excluded because the report was made up of hearsay and self-serving declarations and because the admission of such a report ". . . would open the door to the admission of hearsay and manufactured evidence without limit"; People v. Reese 65 Cal.App.2d 329, 349 (1944), trial court

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39. See Rock v. State of Arkansas, supra, 708 S.W.2d 78 (Ark. 1986).

properly excluded as hearsay a self-serving statement made by the defendant to his wife immediately after the charged homicide; People v. Blanchard 71 Cal.App. 402, 408 (1925), trial court properly excluded as hearsay the self-serving diary of the defendant; People v. Williams 32 Cal.2d 78, 83 (1948), trial court properly excluded as hearsay the self-serving statements of the defendant made to officers prior to the statement introduced by the prosecution; People v. Frye 166 Cal.App.3d 941, 949-951 (1985), trial court properly excluded as hearsay the defendant's self-serving statements made at the police station; People v. Guillebeau 107 Cal.App.3d 531, 549 (1980), trial court properly excluded proposed defense evidence that another individual may possibly have committed

the charged crime because the probative value of the evidence was outweighed by the probability that its admission would "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" under California Evidence Code section 352; People v. Cullen 37 Cal.2d 614, 626 (1951), trial court properly rejected a defendant's request that a psychiatrist be appointed to examine him while under the influence of sodium pentathol because any statements produced would be self-serving hearsay and because the psychiatrist's opinion as to the truthfulness of the statement would be conjectural; People v. Jones 52 Cal.2d 636, 653 (1959), trial court properly denied the defendant's request to testify under the influence of truth serum.

Although cases dealing with defense attempts to introduce hypnotically related evidence are few, these cases also support the holdings of State v. Atwood, supra, Greenfield v. Robinson, supra, and Rock v. State of Arkansas, supra, that trial courts properly applying existing evidentiary rules against the defense do not violate due process: See Jones v. State 542 P.2d 1316, 1326-1327 (Okl. Cr. 1975), defense hypnotist properly barred from expressing his opinion as to the truthfulness of defendant's exculpatory statements of his state of mind at the time of the offense based on a hypnotic interview because the results of using lie detectors, truth serum or hypnosis, when offered in evidence for the purpose of establishing the guilt or innocence of

the accused, are inadmissible; State v. Pusch 46 N.W.2d 508, 521-522 (N.D. 1950), trial court properly barred defense hypnotist from presenting the results of a hypnotic examination of the defendant regarding the facts of the case; People v. Hangsleben 273 N.W.2d 539, 543-544 (Mich. App. 1978), defendant's attempt to prove the reliability of statements made under hypnosis properly rejected; Rodriquez v. State 327 So.2d 903, 904 (Fla. App. 1976) exclusion of all statements made by defendant while under hypnosis upheld; see also People v. Diaz 644 P.2d 71, 73 (Colo. App. 1982), suggesting that on retrial a psychiatrist not be permitted to testify as to the mental state of the defendant if his opinion is based on information gained through hypnosis.

Although the California Supreme Court in People v. Shirley, supra, 31 Cal.3d 18, 67 (1982), held, in dicta, that pretrial hypnosis will not render a defendant's testimony inadmissible because of "the fundamental right of an accused to testify in his own behalf," that dicta was criticized both by the dissenting opinion in that case[40/] and by the concurring opinion in People v. Williams, supra, 132 Cal.App.3d 920, 928 (1982), a case decided shortly after Shirley. As noted by the dissenter in Shirley, ". . . if the majority opinion is correct, then the exception which the opinion establishes for previously hypnotized defendants who wish to testify is insupportable.

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40. Dissenting opinion at 31 Cal.3d, page 77.

Whether the right to testify in one's defense is fundamental . . . or constitutional . . . there can be no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses." As noted by the concurring opinion in Williams, "The idea that the predator may testify and yet his victim may not offends my sense of justice."

The majority opinion in Shirley relied primarily on the Frye rule, which conditions the admissibility of evidence based on a new scientific method of proof on a showing that the technique has been generally accepted as reliable in the scientific community in which it was

developed.41/ That the majority opinion did not think its "defendant exception" through is evidenced by the fact that the Frye rule has often been used against the defendant as well as against the prosecution.42/

Because defendants have no constitutional right to be excused from evidentiary rules for witnesses generally, the trial court did not

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41. Frye v. United States, supra, 293 F. 1013 (D.C. Cir. 1923); People v. Shirley, supra, 31 Cal.3d at pages 34, 47, 51-52. Amicus notes that there is now a conflict in the federal courts as to the continued validity of the Frye rule. (Mustafa v. United States __U.S.__, 106 S.Ct. 444 (Brennan, White, J. J. dis.)(1986).)

42. See People v. Hangsleben, supra, cited in Shirley at 31 Cal.3d, pages 34-35; see also Jones v State, supra, cited in Shirley at 31 Cal.3d, page 35; see also Wilcutt v. State 123 So.2d 763, 764 (Ala. 1971), and Johnson v. State 248 So.2d 763, 764 (Ala. 1971), both following the general rule barring defendants from introducing the results of lie detector tests.

deprive defendant of her right to due process under the Fourteenth Amendment insofar as it properly applied the rules of evidence to restrict her testimony to matters recalled before her hypnotic session.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that petitioner's conviction be affirmed.

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